Pontian United Theatre Sdn Bhd v Southern Finance Bhd (formerly known as United Merchant Finance Bhd)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J–02–230 OF 2005
ABDUL AZIZ MOHAMAD, JAMES FOONG AND ZULKEFLI JJCA
21 FEBRUARY 2006

Companies and Corporations — Winding up — Appeal against winding up — Appeal on judgment pending — Whether appeal operated as stay of execution of judgment — Whether winding up could be ordered although appeal on judgment was pending

Companies and Corporations — Winding up — Appeal against winding up — Counterclaim on judgment — Mere averment of meritorious counterclaim without proof — Whether cross claim or counterclaim by company against petitioning creditor sufficient to stay petition

Companies and Corporations — Winding up — Appeal against winding up — Whether security for loan must be realized first before proceeding to winding up — —

Companies and Corporations — Winding up — Verifying affidavit filed on same day as winding up petition — Whether affidavit was sworn after petition was presented — Affidavit was sworn with copy of endorsed petition, whether this proved that when affidavit was sworn, petition had already been presented — Companies (Winding Up) Rules 1972 r 26

The respondent presented and obtained a winding up order against the appellant company on the ground that the appellants were unable to pay their debts for having neglected to settle a statutory demand. The appellants appealed against the winding up order.

The appellants relied on the following grounds: (1) the appellants' appeal against the judgment of the High Court was pending before this court; (2) the appellants had a counterclaim against the respondents for RM4.8m, larger than the amount underlying the winding up petition; (3) the appellants claimed that the affidavit was sworn before, and not after, the petition was presented — this was in breach of the requirement of r 26 of the Companies (Winding Up) Rules 1972 that the affidavit verifying a winding up petition 'shall be sworn after and filed within four days after the petition is presented'. The petition was presented in Johor Bahru on 5 May 2004. The affidavit was sworn in Kuala Lumpur, also on 5 May 2004. In the appellants' affidavit in opposition to the petition, they contended that the affidavit was affirmed before or on the same day as the petition was filed and not after. They also invited the court's attention to the fact that the affidavit was sworn in Kuala Lumpur and the petition was filed in Johor Bahru; and (4) the respondents should not have proceed to a winding up until the security for the loan had been realized since the appellants' liability would only be for any shortfall.

Held, dismissing the appeal with costs:

(1) (per **Abdul Aziz JCA**) A judgment for a sum establishes the debt, which then becomes due to the person to whom it is owed, who then becomes the creditor. The sum remains due even though the debtor's appeal against the judgment is pending, because an appeal does not operate as a stay of execution. The sum must be paid unless execution of the judgment has been stayed, in which event it is no longer due. In this case, there was no stay of execution of the summary judgment. The sum was therefore due when the demand under s 218(2)(a) was made. By the appellants' failure to settle the demand for three weeks after it was made, they were to be deemed to be unable to settle their debts, a circumstance which constituted one of the grounds on which the appellants could be wound up (see para 3); *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 and *Public Bank Bhd v Muhibbah Meridian Sdn Bhd* [2001] 1 MLJ 21 not followed.

(2) (per **Abdul Aziz JCA**) It is not sufficient for a company facing a winding up petition to merely aver by affidavit the existence of a meritorious counterclaim and exhibit for proof the statement of defence and counterclaim, which is not evidence. The company must set out in the affidavit the facts on which the counterclaim is based, giving the necessary details so as to lend earnestness and weight to their claim and so that the petitioner will have a fair opportunity to present his side of the story by affidavit and the court, by considering the affidavits, will be able to assess, without actually deciding it, whether the claim has weight or raises a serious issue (see para 19). The need for an affidavit in this case became greater because the averments in the statement of defence and the counterclaim were prima facie incredible. These the appellants had failed to do (see para 20).

(3) (per **Abdul Aziz JCA**) The fact that when the affidavit was sworn in Kuala Lumpur it exhibited a copy of the endorsed petition proved, prima facie, that when the affidavit was sworn in Kuala Lumpur the petition had been presented in Johor Bahru. If it had not, the copy of the endorsed petition would not have been available to be exhibited to the affidavit. Therefore, there was prima facie inescapable conclusion from the facts that the affidavit was sworn after the petition was presented. With that prima facie inescapable conclusion, the question how it was possible for an endorsed copy of the petition that was presented in Johor Bahru on 5 May 2005 to be available in Kuala Lumpur on the same day became of secondary importance. On the other hand, there was the averment in para 9(i) of the appellants' affidavit that the verifying affidavit was not sworn after the petition was presented, to which the respondents did not reply. Since the appellants' affidavit did not trouble to argue specifically why the verifying affidavit could not have been sworn after the petition was presented, and since the perceivable facts showed that the affidavit could only have been sworn after the petition was presented, the failure of the respondents to reply cannot be taken as an admission that the verifying affidavit was sworn before the petition was presented (see para 25).

(4) (per **Abdul Aziz JCA**) To require the lender to first realize his security before suing for the debt would unduly delay the recovery of the debt, especially where, as in this case, the enforcement of the charge had been successfully

opposed and the matter was under appeal, so that the chargor would have to wait until he succeeds at a level of appeal or until he finally loses at the final level of appeal before being able to sue for the debt (see para 32); *Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd* [1980] 2 MLJ 84 distinguished and *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 followed. Also, cl 34 of the charge annexure would provide a complete answer to the fourth ground (see para 33).

(5) (per **Zulkefli JCA**) If it be right that the making of a cross claim or counterclaim by a company against a petitioning creditor is enough to stay the petition, there would be widespread abuse and judgment creditors would be deprived of the rights which the law gives them. It is for this reason that it has been held that the mere fact of a cross claim or a counterclaim is never of itself a bar to the making of a winding up order on a petition by a petitioning creditor (see para 39); *Re Douglas Griggs Engineering Ltd* [1963] Ch 19 followed.

(6) (per **Zulkefli JCA**) The modern practice is that where a company had a genuine and serious cross claim or counterclaim against the petitioning creditor which it had not reasonably been able to litigate, the petition should usually be dismissed or stayed (see para 40); *Re LHF Wools Ltd* [1970] 1 Ch 271 followed. It is not sufficient for a company facing a winding up petition to merely aver by affidavit the existence of a meritorious counterclaim. The company must set out by way of affidavit evidence the facts on which the counterclaim is based, giving the necessary details so that the petitioner will have a fair opportunity to present its side of the story by affidavit and the court, by considering the affidavits will be able to assess, without actually deciding it, whether the claim has weight or raises a serious issue. The appellant in the present case had not done that (see para 40).

[Bahasa Malaysia summary

Responden telah mengemukakan dan memperoleh perintah penggulungan terhadap syarikat perayu atas alasan bahawa perayu-perayu tidak mampu membayar hutang mereka kerana gagal untuk menyelesaikan tuntutan statutori. Perayu-perayu telah merayu terhadap perintah penggulungan itu.

Perayu-perayu telah bergantung kepada alasan-alasan berikut: (1) rayuan perayu-perayu terhadap penghakiman Mahkamah Tinggi masih belum selesai di hadapan mahkamah ini; (2) perayu-perayu telah membuat tuntutan balas terhadap responden–responden untuk RM4.8j, jumlah yang lebih besar daripada apa yang terdapat dalam petisyen penggulungan; (3) perayu-perayu menuntut bahawa afidavit telah diangkat sumpah sebelum, dan bukan selepas, petisyen dikemukakan — ini merupakan satu perlanggaran keperluan k 26 Kaedah-Kaedah (Penggulungan) Syarikat 1972 bahawa afidavit yang mengesahkan petisyen penggulungan 'shall be sworn after and filed within four days after the petition is presented'. Petisyen itu telah dikemukakan di Johor Bahru pada 5 Mei 2004. Afidavit itu telah diangkat sumpah di Kuala Lumpur, juga pada 5 Mei 2004. Dalam afidavit bangkangan perayu-perayu terhadap petisyen itu, mereka berhujah bahawa afidavit itu telah disahkan sebelum atau pada hari sama petisyen itu difailkan dan bukan selepas.

Mereka juga menarik perhatian mahkamah kepada fakta bahawa afidavit telah diangkat sumpah di Kuala Lumpur dan petisyen itu telah difailkan di Johor Bahru; dan (4) responden-responden tidak patut meneruskan penggulungan sehingga sekuriti untuk pinjaman telah direalisasikan memandangkan liabiliti perayu-perayu hanya untuk apa-apa kurangan.]

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **Abdul Aziz HMR**) Satu penghakiman untuk jumlah tertentu membuktikan hutang, yang perlu dibayar kepada seseorang yang mana ia berhutang pada, yang menjadi pemiutang. Jumlah tersebut masih perlu dibayar meskipun rayuan penghutang terhadap penghakiman masih belum selesai, kerana suatu rayuan tidak berfungsi sebagai satu penggantungan pelaksanaan. Jumlah tersebut hendaklah dibayar kecuali pelaksanaan penghakiman digantung, di man ia tidak perlu dibayar. Dalam kes ini, tiada penggantungan pelaksanaan penghakiman terus itu. Jumlah tersebut oleh itu perlu dibayar apabila tuntutan di bawah s 218(2)(a) dibuat. Disebabkan kegagalan perayu untuk menyelesaikan tuntutan untuk tiga minggu selepas ia dibuat, mereka dianggap tidak mampu melangsaikan hutang mereka, satu keadaan yang membentuk salah satu daripada alasan yang mana perayu-perayu boleh digulungkan (lihat perenggan 3); *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 dan *Public Bank Bhd v Muhibbah Meridian Sdn Bhd* [2001] 1 MLJ 21 tidak diikut.

(2) (oleh **Abdul Aziz HMR**) Ia tidak memadai untuk syarikat yang mendapat petisyen penggulungan untuk hanya menegaskan melalui afidavit tentang kewujudan tuntutan balas dan ekshibit sebagai bukti penyataan pembelaan dan tuntutan balas, yang tidak dikemukakan. Syarikat hendaklah menyatakan dalam afidavit fakta yang mana tuntutan balas diasaskan, memberikan butiran yang perlu untuk memberi kesungguhan dan beban kepada tuntutan mereka dan agar pempetisyen mempunyai peluang adil untuk mengemukakan kisah di pihaknya melalui afidavit dan mahkamah, dengan mengambilkira afidavit-afidavit, akan dinilai, tanpa membuat keputusan, sama ada tuntutan itu mempunyai beban atau menimbulkan persoalan serius (lihat perenggan 19). Keperluan untuk satu afidavit dalam kes ini menjadi lebih penting kerana penegasan dalam penyataan pembelaan dan tuntutan balas adalah prima facie. Perayu-perayu tersebut gagal untuk berbuat demikian (lihat perenggan 20).

(3) (oleh **Abdul Aziz HMR**) Fakta bahawa apabila afidavit diangkat sumpah di Kuala Lumpur, ia mengekshibitkan satu salinan petisyen yang telah diindorskan yang membuktikan, prima facie, bahawa apabila afidavit diangkat sumpah di Kuala Lumpur petisyen itu telah dikemukakan di Johor Bahru. Jika tidak, salinan petisyen yang diindorskan tidak akan diekshibitkan pada afidavit itu. Oleh itu, terdapat kesimpulan prima facie yang tidak dapat dielakkan berdasarkan fakta tersebut bahawa afidavit telah diangkat sumpah selepas petisyen dikemukakan. Berdasarkan kesimpulan prima facie yang tidak dapat dielakkan, persoalan bagaimana ia mungkin untuk suatu salinan petisyen yang diindorskan yang telah dikemukakan di Johor Bahru pada 5 Mei 2005 terdapat di Kuala Lumpur pada hari yang sama menjadi suatu yang kurang

penting. Sebaliknya, terdapat penegasan dalam perenggan 9(i) kepada afidavit perayu-perayu bahawa afidavit pengesahan tidak diangkat sumpah selepas petisyen dikemukakan, yang mana responden-responden tidak memberi jawapan. Memandangkan afidavit perayu-perayu tidak menghujahkan secara khusus kenapa afidavit pengesahan tidak boleh diangkat sumpah selepas petisyen dikemukakan, dan memandangkan fakta yang dapat dilihat menunjukkan bahawa afidavit hanya boleh diangkat sumpah selepas petisyen dikemukakan, kegagalan responden-responden untuk menjawab tidak boleh dianggap sebagai penerimaan bahawa afidavit penegasan itu telah diangkat sumpah sebelum petisyen dikemukakan (lihat perenggan 25).

(4) (oleh **Abdul Aziz HMR**) Untuk menghendaki pemberi pinjaman menyedari jaminan beliau sebelum menyaman kerana hutang akan melengah-lengahkan mendapat balik hutang tersebut, terutamanya jika, dalam kes ini, penguatkuasaan gadaian telahpun dibangkang dengan jayanya dan perkara tersebut telah dirayui, oleh itu penggadai perlu menunggu sehingga beliau berjaya di peringkat rayuan atau sehingga beliau gagal ke peringkat rayuan terakhir sebelum dapat menyaman untuk hutang tersebut (lihat perenggan 32); *Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd* [1980] 2 MLJ 84 dibeza dan *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 diikut. Dan kl 34 kepada lampiran gadaian akan memperuntukkan jawapan yang lengkap untuk alasan keempat (lihat perenggan 33).

(5) (oleh **Zulkefli HMR**) Jika betul bahawa membuat tuntutan balas oleh syarikat terhadap pemiutang yang membuat petisyen memadai untuk menggantung petisyen, akan berlaku penyalahgunaan dan pemiutang penghakiman akan terkilan hak undang-undang yang diberikan kepada mereka. Oleh sebab ini telah diputuskan bahawa hakikat bahawa tuntutan balas dengan sendirinya bukan penghalang untuk membuat perintah penggulungan ke atas suatu petisyen oleh pemiutang yang membuat petisyen itu (lihat perenggan 39); *Re Douglas Griggs Engineering Ltd* [1963] Ch 19 diikut.

(6) (oleh **Zulkefli HMR**) Amalan moden adalah di mana syarikat itu mempunyai tuntutan balas yang tulen dan serius terhadap pemiutang yang membuat petisyen yang ia tidak dapat dengan agak berpatutan untuk membuat litigasi, petisyen tersebut patut ditolak atau digantung (lihat perenggan 40); *Re LHF Wools Ltd* [1970] 1 Ch 271 diikut. Ia tidak memadai untuk syarikat yang berhadapan dengan petisyen penggulungan untuk menegaskan sahaja melalui afidavit kewujudan tuntutan balas yang bermerit. Syarikat itu hendaklah mengemukakan melalui keterangan afidavit fakta yang mana tuntutan balas tersebut didasari, memberikan butiran yang diperlukan agar pempetisyen mempunyai peluang adil untuk mengemukakan kisahdi pihaknya melalui afidavit dan mahkamah, dengan menimbangkan afidavit-afidavit tersebut akan dapat menilai, tanpa perlu membuat keputusan berhubungnya, sama ada tuntutan itu mempunyai beban atau menimbulkan persoalan serius. Perayu dalam kes semasa tidak berbuat demikian (lihat perenggan 40).

Notes

For a case on appeal against winding up, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 869.

For a case on Verifying affidavit filed on same day as winding up petition, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 1357.

Cases referred to

Chin Yoon Timber Co v Overseas Lumber Bhd [1978] 2 MLJ 173 (refd)
Douglas Griggs Engineering Ltd, In re [1963] Ch 19 (folld)
LHF Wools Ltd, In re [1970] 1 Ch 27 (folld)
Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah [1991] 3 MLJ 119 (refd)
Jeff Reid Pty Ltd, Re (1980) 5 ACLR 28 (refd)
Lim Tok Chiow & Anor v Dian Tong Credit & Development Sdn Bhd [1994] 2 MLJ 345 (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (folld)
Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd [1982] 2 MLJ 53 (refd)
Ng Tai Tuan & Anor v Chng Gim Huat Pte Ltd [1991] 3 MLJ 338 (refd)
Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd [1980] 2 MLJ 83 (distd)
Portman Provincial Cinemas Ltd, In re (1964) 108 Sol J 581 (refd)
Public Bank Bhd v Muhibbah Meridian Sdn Bhd [2001] 1 MLJ 31 (not folld)
RHB Bank Bhd v Gunasingam a/l Ramasingam [2002] 7 MLJ 492 (refd)
Sobri bin Arshad v Associated Tractors Sdn Bhd [1991] 3 MLJ 32 (refd)
Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd [1998] 6 MLJ 437 (not folld)
YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd [1996] 2 MLJ 482 (refd)

Legislation referred to

Companies Act 1965 s 218(2)(a)
Companies (Winding Up) Rules 1972 r 26

Mathews George (Mathews George & Co) for the appellants.
Dr Wong Kim Fatt (Nadiah Hanim Ishak with him) (Gulam & Wong) for the respondents.

Abdul Aziz Mohamad JCA:

[1] This appeal is against a winding up order made by the High Court against the appellant company. The winding up was sought on the ground that the appellants were unable to pay their debts for having neglected to settle a statutory demand served on them on 13 March 2004, by the respondents under s 218(2)(a) of the Companies Act 1965. The sum demanded was RM4,288,727.52 as at 15 September 2000, being, according to the petition, the amount of a final judgment obtained by the respondents on 22 August 2003. That was the date on which was dismissed the appellant's appeal to the judicial commissioner (as judge in chambers) against a summary judgment for that sum given by the senior assistant registrar on the respondents' application dated 12 April 2001. The appellants opposed the petition by

filing an affidavit in opposition. The respondents did not reply to that affidavit. The appellants' opposition was on four grounds, on all of which the appellants failed in the High Court. The same four grounds have been raised in this appeal.

FIRST GROUND

[2] For the first ground the appellants rely on the fact that their appeal against the judgment of the High Court of 22 August 2003, is pending before this court and on the ruling of Rekhraj J in *Solid Kitchen Sdn Bhd v Regal Development Sdn Bhd* [1998] 6 MLJ 437 and *Public Bank Bhd v Muhibbah Meridian Sdn Bhd* [2001] 1 MLJ 31 that a debt under a judgment which is under appeal cannot be said to be an undisputed debt and therefore cannot form the basis for a demand under the said s 218(2)(a).

[3] I do not agree. A demand on a company under s 218(2)(a) may be made by 'a creditor … to whom the company is indebted in a sum exceeding five hundred ringgit then due'. A judgment for a sum establishes the debt, which then becomes due to the person to whom it is owed, who then becomes the creditor. The sum remains due even though the debtor's appeal against the judgment is pending, because an appeal does not operate as a stay of execution. The sum must be paid unless execution of the judgment has been stayed, in which event it is no longer due. In this case there was no stay of execution of the summary judgment. The sum was therefore due when the demand under s 218(2)(a) was made. By the appellants' failure to settle the demand for three weeks after it was made they were to be deemed to be unable to settle their debts, a circumstance which constituted one of the grounds on which the appellants could be wound up. The appeal on the first ground therefore fails.

SECOND GROUND

[4] The second ground is that the appellants had a counterclaim against the respondents for RM4.8m, larger than the amount underlying the winding up petition.

[5] Let me first set out the circumstances pertaining to this ground.

[6] According to the statement of claim, by a letter of offer dated 7 August 1995, the respondents offered and the appellants accepted a revolving credit of RM3.3m, and on 14 August 1995 a loan agreement was signed, one of whose terms was that the principal and any accrued interest were payable on demand. As at 15 September 2000, the account stood at RM4,288,727.52, which comprised the principal sum of RM3.3m and interest and other charges in the sum of RM988,727.52. A notice of demand dated 23 September 2000, was served on the appellants demanding payment of the sum of RM4,288,727.52 but the appellants failed to pay.

[7] In their statement of defence, as far as the respondents' claim was concerned, the appellants, while admitting their acceptance of the offer of the credit facility and

their signing of the loan agreement, called on the respondents to prove their claim. As to the interest, the appellants raised various issues, such as that the rate at which interest was charged exceeded the agreed rate. As regards the principal sum, the appellants averred that the loan was to finance a housing project in Pontian which they expected to manage and that there was an oral agreement between them and the respondents that for the time being they were not required to pay the principal, which would be payable only from the profits from the housing project.

[8] To pave the way for the counterclaim, the appellants, in paras 17–20 of the statement of defence, averred that the respondents had orally agreed to give them another loan of between RM500,000 and RM700,000 to enable them to settle the arrears of interest and to commence the housing project, but had failed to give the further loan; that the project had received government approval and could be commenced soon after obtaining the further loan; and that since the project could not be commenced the appellants had suffered losses in the sum of RM4.8m, being expected profits from the sale of completed houses to the public.

[9] In paragraph 1 of the counterclaim the appellants averred that the amount of the promised further loan was RM750,000 and that the promise was made in March 1998 — more than two years after the agreement for the loan of RM3.3m — by Cik Gladys Tan, the respondents' Branch Manager in Pontian, and Encik Gan Chin Keh, the respondents' General Manager at their headquarters in Kuala Lumpur. In paras 3 and 4 of the counterclaim the appellants contended that with the returns from the sale of completed houses they would have been able to settle the principal and interest of the loan and make a profit of RM4.8m as well.

[10] In their reply, the respondents denied the allegation of the promise of the further loan.

[11] In their affidavit in opposition to the winding up petition, the appellants raised this second ground in para 5(iii), where they simply averred that they had a meritorious counterclaim against the respondents that had not been decided. They did not in their affidavit set out the facts on which they based their counterclaim. They merely exhibited a copy of their statement of defence and counterclaim.

[12] In their skeletal submission in the winding up petition, the appellants simply said that a winding up order would prevent them from prosecuting their counterclaim and would therefore cause great injustice to them. They cited *Ng Tai Tuan & Anor v Chng Gim Huat Pte Ltd* [1991] 3 MLJ 338, a decision of the Singapore High Court, and *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1982] 2 MLJ 53, a decision of the Privy Council.

[13] The learned judge did not consider those cases but held that the counterclaim was a separate matter and did not affect the respondents' entitlement to claim from the appellants on the judgment entered against them.

[14] Before us, the appellants cited *Ng Tai Tuan*, *Re Jeff Reid Pty Ltd* (1980) 5 ACLR 28, one of the cases considered in *Ng Tai Tuan*, and, indirectly, *In re HF Wools Ltd* [1970] 1 Ch 27 ('the *Wools* case'), a decision of the English Court of Appeal, which, besides other cases, referred to *In re Portman Provincial Cinemas Ltd* (1964) 108 Sol J 581 ('the *Portman* case'), also a decision of the English Court of Appeal. All those cases were cases in which the winding up petition was dismissed or stood over because of the existence of a counterclaim which equalled or exceeded the debt on which the petition was based. In *Ng Tai Tuan* and the *Wools* case the debt was a judgment debt.

[15] The *Portman* case was reported only in the *Solicitors' Journal* and the report gives only a brief summary of what the judges (Lord Denning MR, Harman and Russell LJJ) said. What the judges actually said one learns only from the *Wools* case, where, as one learns from the submission of the company's counsel at p 30G, recourse was had to the transcript of the judgments in the *Portman* case. The Court of Appeal in *Wools* case consisted of Harman, Danckwerts and Edmund Davies LJJ. At p 36, Harman LJ, whose was the leading judgment, quoted what Lord Denning MR had stated in the *Portman* case, saying that it was the law that they, in the *Portman* case, had all agreed on and that he, Harman LJ himself, and Russell LJ had used much the same language. This was the law in the words of Lord Denning as given at p 36D–E of the *Wools* case:

> As I understand the law on the matter, it is this: if this is a genuine cross claim with substance in it, then let it be tried out in the Queen's Bench Division: this petition must be rejected. But if there is no substance in the cross claim, then let the court do justice to the petitioners in this case and not give heed to so insubstantial a cross claim.

It may be understood from those words that so long as there is a genuine cross claim with substance in it which equals or exceeds the debt on which it is based, the winding up petition must be rejected.

[16] But when focusing on the actual cross claim in the *Wools* case, Harman LJ, with whom Danckwerts and Edmund Davies LJJ concurred, said this at p 37D:

> How, then, does the matter stand? The bank has a judgment debt: it is, therefore, entitled ex debito justitiae to a winding up order. This is not in the ordinary case, there being no other circumstances, a discretionary matter, but where there is in fact a cross claim such as in the present case, or where there are for instance competing creditors on one side or the other, it always comes down in the end to a matter for the discretion of the judge.

What was meant by 'a cross claim such as in the present case' may be understood from pp 36G–H and 37B, that is, 'a good cross claim' or 'a cross claim which … has at least some chance of success' and which, if it succeeds, 'will overtop the bank's claim in the petition'. It may be understood from the passage that even though there is such a cross claim, the winding up judge still has a discretion, to be exercised for good reason, to order a winding up.

[17] In the Privy Council in *Malayan Plant (Pte) Ltd v Moscow Narodny Bank Ltd* [1980] 2 MLJ 53, Lord Edmund-Davies, who delivered the judgment of the Board, said at p 55A–B (left):

> There is no distinction in principle between a cross-claim of substance (such as in the Wools case) and a serious dispute regarding the indebtedness imputed against a company, which has long been held to constitute a proper ground upon which to reject a winding up petition."

It suggests the same as what, as I said, may be understood from Lord Denning's words in the *Portman* decision, that so long as there is a cross claim of substance, the winding up petition must be rejected. It is interesting to note that in the *Wools* case earlier, at p 42D–E, Edmund Davies LJ had said, in reference to Lord Denning's words in the *Wools* case, as follows:

> If by those words he was in effect saying that the discretion of a judge in those circumstances must inevitably and invariably be exercised by rejecting the petition out of hand, it is an expression of opinion which I would respectfully desire to leave for further consideration when the question arises in a direct form in a future case.

[18] In the present case, the winding up judge did not consider whether the appellants' counterclaim was a genuine counterclaim of substance. Whether the existence of an overtopping counterclaim that is of substance is in itself a ground for refusing a winding up order, or whether, even with the existence of such a counterclaim, the court still has a discretion to order a winding up, for the appellants to succeed on this ground they must at least show the existence of a genuine counterclaim of substance. In my view, they have not done that.

[19] It is not sufficient for a company facing a winding up petition to merely aver by affidavit the existence of a meritorious counterclaim and exhibit for proof the statement of defence and counterclaim, which is not evidence. Evidence is required. The company must set out in the affidavit the facts on which the counterclaim is based, giving the necessary details so as to lend earnestness and weight to their claim and so that the petitioner will have a fair opportunity to present his side of the story by affidavit and the court, by considering the affidavits, will be able to assess, without actually deciding it, whether the claim has weight or raises a serious issue. For example, in this case, the circumstances in which the two bank officers, stationed at different places, allegedly made the oral promise, and the circumstances leading to the making of it, must be set out in the affidavit. In the Wools case it will be noticed from p 30 A that 'a good deal of evidence was filed in support of and in opposition to the petition', and although, as may be gathered from p 36G–H, the winding up judge (Plowman J) 'assumed without investigating the matter in detail that there was a good cross claim', I tend to think that the assumption was made in view of the existence of such a good deal of evidence.

[20] The need for an affidavit in this case becomes the greater because the averments in the statement of defence and the counterclaim are prima facie incredible. The loan of RM3.3m was said to be for the prospective Pontian housing project. The alleged oral promise of a further loan was said to have been made in March 1998, more than two years later, and the further loan was said to enable the appellants to commence the project. It looks as if by March 1998 the RM3.3m had been spent, but not on the project, because if it had been spent on the project, then the project had already commenced and the appellants would not have needed the

further loan to commence the project, but if the RM3.3m had not yet been spent, and the project had not commenced, the appellants already had the money to commence the project and would have had no need for the further loan. It is incredible that in those circumstances the bank had agreed to grant a further loan. But if the officers, acting responsibly, had agreed, in spite of everything, to grant a further loan, it is incredible that it was done purely on an oral basis without a formal letter of offer, and it is incredible, in the absence of a suggested reason, that they should have turned back on their word.

[21] For those reasons the appeal on the second ground fails.

THIRD GROUND

[22] The third ground concerns the requirement of r 26 of the Companies (Winding Up) Rules 1972 that the affidavit verifying a winding up petition 'shall be sworn after and filed within four days after the petition is presented'. It is the case of the appellants that the affidavit was sworn before, and not after, the petition was presented. They rely on the decision of this court in *YPJE Consultancy Service Sdn Bhd v Heller Factoring (M) Sdn Bhd (formerly known as Matang Factoring Sdn Bhd* [1996] 2 MLJ 482 ('the *YPJE* case') where, at p 492A-B, Ahmad Fairuz JCA (now CJ), speaking for the court, said, after considering the two authorities cited by counsel for the appellants, *Chin Yoon Timber Co v Overseas Lumber Bhd* [1978] 2 MLJ 173 and *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32.

> What is clear from these authorities is that the affidavit must be made in some cause or matter which is actually pending in the court. Consequently, the affidavit which was sworn before the presentation of the petition would cause the petition to be void.

The appellants also rely on the earlier case of *Lim Tok Chiow & Anor v Dian Tong Credit & Development Sdn Bhd* [1994] 2 MLJ 345, where Abdul Kadir Sulaiman J (now FCJ), held that the winding up petition was bad by reason of the verifying affidavit having being sworn before the presentation of the petition.

[23] In the *YPJE* case, this court agreed with the finding of the learned trial judge that the verifying affidavit must have been made after the petition was presented because both the affidavit and the petition bore the same date 10 July 1995 and the affidavit referred to the petition which was attached to it and because there was no evidence to show that the affidavit had been sworn before the petition was presented. At p 492D, the learned Chief Justice said: 'On the basis of this rationale, I am of the view that the authorities cited by learned counsel for the appellant are not applicable to the factual situation in this appeal'. Although at p 492H the learned Chief Justice asked the question, 'Is it just that the petition be dismissed only for the reason that the date was one which was not dated after a date stated in the petition when it was clear from the affidavit that the affidavit refers to that petition itself?', this court did not go so far as to say that in law even if the affidavit had been sworn before the petition was presented the petition was not void. In the present appeal, the respondents' counsel impliedly accepted it as the law that if the verifying affidavit was

affirmed before the petition was presented the petition was void, because his only answer to this ground was to argue against the contention that the affidavit was sworn before the presentation of the petition.

[24] The facts are these. The petition was presented in Johor Bahru on 5 May 2004. The affidavit was sworn in Kuala Lumpur, also on 5 May 2004. It referred to the petition, and exhibited a copy of it. The copy of the petition that was exhibited bore an endorsement by the senior assistant registrar that the petition was presented on 5 May 2004, and was to be heard on 12 July 2004. The fact of exhibition of the petition was certified by the commissioner for oaths before whom the affidavit was sworn on 5 July 2005. The affidavit was filed in Johor Bahru on 7 May 2004. This latter fact, although not apparent from the copy of the affidavit in the appeal record, was stated by the respondents' counsel himself in submission in the High Court. This third ground was raised in para 9(i) of the appellants' affidavit in opposition to the petition, where they contended that the affidavit was affirmed before or on the same day as the petition was filed (sebelum atau pada hari yang sama dengan pemfailan petisyen tersebut) and not after. They also invited the court's attention to the fact that the affidavit was sworn in Kuala Lumpur and the petition was filed in Johor Bahru.

[25] The position, therefore, comes down to this. The fact that when the affidavit was sworn in Kuala Lumpur it exhibited a copy of the endorsed petition proves, prima facie, that when the affidavit was sworn in Kuala Lumpur the petition had been presented in Johor Bahru. If it had not, the copy of the endorsed petition would not have been available to be exhibited to the affidavit. That is, prima facie, an inescapable conclusion. So we have here on the one hand a prima facie inescapable conclusion from the facts that the affidavit was sworn after the petition was presented. With that prima facie inescapable conclusion, the question how it was possible for an endorsed copy of the petition that was presented in Johor Bahru on 5 May 2005 to be available in Kuala Lumpur on the same day becomes of secondary importance. It was something that would not have been too difficult to achieve. It would not have been too difficult to have a copy of the petition conveyed from Johor Bahru to Kuala Lumpur on the same day. On the other hand, there is the averment in para 9(i) of the appellants' affidavit that the verifying affidavit was not sworn after the petition was presented, to which the respondents did not reply. In my judgment, since the appellants' affidavit did not trouble to argue specifically why the verifying affidavit could not have been sworn after the petition was presented, and since the perceivable facts show that the affidavit could only have been sworn after the petition was presented, the failure of the respondents to reply cannot be taken as an admission that the verifying affidavit was sworn before the petition was presented. I ought, for completeness, to mention that the learned winding up judge simply followed the reasoning for the decision in the *YPJE* case, relying on the fact that the petition was presented on the same day that the verifying affidavit was sworn.

[26] For those reasons the appeal on the third ground fails.

FOURTH GROUND

[27] As security for the loan, the appellants had charged to the respondents a piece of land. In the year 2000, the respondents had attempted to realize the security by

applying for an order for sale but the application was opposed by the appellants and was dismissed on 9 October 2002. The respondents' appeal to this court against the dismissal of their application is pending. The respondents presented their winding up petition in 2004.

[28] The appellants' case under the fourth ground is that the respondents should not have proceeded to a winding up until the security had been realized since the appellants' liability would only be for any shortfall.

[29] One of the cases cited by the appellants in support of this ground is *Ng Yik Seng & Anor v Perwira Habib Bank Malaysia Bhd* [1980] 2 MLJ 83. That was a case where a bank, which had a piece of land as security for an overdraft, sued the guarantors for repayment and applied for summary judgment. At the High Court, the guarantors, whose only ground for resisting the application was that they did not sign the guarantee, was given leave to defend conditional upon payment into court of a certain sum. The guarantors, who were dissatisfied with only a conditional leave, appealed. The Federal Court found that the High Court was right in giving conditional leave to defend but nevertheless allowed the guarantors' appeal and gave them unconditional leave to defend. The reason, that seems to stem from the fact, as stated at p 84I (left), that "the realisation of the charge would more than repay the overdraft", is reflected in the following words of Chang Min Tat FJ, at p 84D (right):

> The present case … may well turn out to be effectively a case of … a useless piece of litigation, so that a court may very well in the exercise of its discretion stay, not dismiss, the action until after the completion of the sale of the property that had been charged to the Bank.

It was, I think, because of the consideration that the action against the guarantors might have been stayed that the Federal Court felt that the leave to defend should be unconditional, although a little further on Chang Min Tat FJ said:

> We however consider that the application for a stay should, if thought one with reasonable prospects of success, be made in the first place to the court before whom the action is brought.

[30] In my opinion, that case cannot be applied to the present case for several reasons. The existence of a charge was in that case taken as a factor in considering whether to grant a conditional leave or an unconditional leave to defend, whereas in the present case judgment had been entered against the appellants, albeit that an appeal to this court is pending. The existence of a charge might, according to the Federal Court, be a ground for a stay of the action on the debt, whereas here the matter had reached the stage of winding up based on the judgment, and there had been no application for a stay of the action on the debt. In that case the consideration of the existence of the charge arose in a question of choice, as between two types of security, the guarantors and the charge, of which to go for first, whereas in the present case the choice is as between the borrower and the security. Finally, that case went only to the extent of using the existence of the charge as a factor in determining that the leave to defend ought to be unconditional; it did not lay down the substantive law on a chargee's right to proceed to recover his debts.

[31] The law is stated by the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 in these words of Gopal Sri Ram JCA at p 93B:

> Now, it is trite that a chargee/creditor may pursue any or all remdies to recover monies lent by him. He may enforce his statutory charge against the chargor by way of proceedings in rem under s 256 of the Code. He may sue the principal debtor (who may or may not be the chargor) upon the personal covenant contained in any loan agreement that was entered into between the parties. He may proceed against the surety who has guaranteed the loan. And he may pursue all of these courses simultaneously, contemporaneously or successively. See *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839 at p 842.

[32] A member of the Federal Court panel in that case was Lamin PCA, who, as a judge of the High Court, had answered in the negative in *Hongkong & Shanghai Banking Corp Ltd v Wan Mohd bin Wan Ngah* [1991] 3 MLJ 119, one of the cases relied on by the appellants, the question whether the plaintiff in that case was 'entitled at law and in equity to proceed by way of a civil suit before first realizing the security under the charge'. According to the editorial note to the report the plaintiff's appeal to the Supreme Court was dismissed on 11 June 1991, but the grounds of the Supreme Court are not available. The basis of the ruling of Lamin J was the fact that cl 8 of the annexure to the charge provided that if the amount realized by the chargee on a sale of the land was less than the amount due to the chargee, 'the chargor(s) shall pay to the chargee the difference … and until payment will also pay interest on such balance …'. In my opinion such a term is as it inevitably should be in the context of the enforcement of a charge if and when it is enforced, but it should not be construed as an agreement that the chargor should not seek his remedy under the loan agreement before exhausting his remedy under the charge. To require the lender to first realize his security before suing for the debt would unduly delay the recovery of the debt, especially where, as in this case, the enforcement of the charge has been successfully opposed and the matter is under appeal, so that the chargor would have to wait until he succeeds at a level of appeal or until he finally loses at the final level of appeal before being able to sue for the debt.

[33] In their written submission, the respondents' counsel quoted cl 34 of the charge annexure in this case. It is as follows:

> Notwithstanding the provisions herein, in the event of default or breach by the Chargor and or the Borrower of any terms, covenant, stipulation and or undertaking herein on the part of the Chargor and or the borrower to be observed and performed, the Chargee may forthwith exercise all or any of the remedies and rights available whether by virtue of this Charge or by statute or otherwise. In addition the Chargee shall be at liberty to exercise such rights and remedies including the right to pursue the remedies conferred by the National Land Code 1965 and the civil proceedings to recover all monies due and owing to the Chargee concurrently.

That clause would provide a complete answer to the fourth ground were it not that it is not formally in evidence before us.

[34] In the High Court, the appellants relied only on *RHB Bank Bhd v Gunasingam a/l Ramasingam* [2002] 7 MLJ 492 in support of this ground. So also in their initial oral submission before us. That being so, the judge disposed of this

ground merely by saying, rightly, that the case, 'merely concern with the discretion of the court whether to grant an injunction to present a winding up petition against the respondent where there are alternative means of recovering a judgment debt. It is not an authority for saying that a judgment creditor must first seek to recover its debt by execution.'

[35] In any case, I think that this fourth ground is a ground that should have been raised at the summary judgment stage and, if it was then raised, should be raised in the appeal against the summary judgment, since it questions the respondents' right to sue for the debt.

[36] For those reasons, this ground also fails. Since the appellants fail on all grounds, I would dismiss the appeal with costs and order that the deposit be paid to the respondents on account of taxed costs.

[37] My learned brother, James Foong JCA, who has read this judgment in draft, has expressed his agreement with it.

Zulkefli JCA concurring:

[38] I have read the judgment in draft of my learned brother Abdul Aziz Mohamad JCA. His Lordship has comprehensively dealt with all the four grounds of appeal raised by the appellant in opposing the petition. I fully agree with the views expressed and the decision of his Lordship to dismiss the appellant's appeal. I would like to add a few words on the second ground of appeal in support of the judgment as follows:

[39] The appellant alleged that it had a counterclaim against the respondent for RM4.8m, larger than the amount underlying the winding up petition. Following from there, it is the contention of the appellant based on decided cases a winding up petition would be dismissed or stood over whenever there is the existence of a counterclaim or cross claim which equalled or exceeded the debt on which the petition was based. On this contention of the appellant, I need to place words of caution here in that if it be right that the making of a cross claim or counterclaim by a company against a petitioning creditor is enough to stay the petition, there would be widespread abuse and judgment creditors would be deprived of the rights which the law gives them. It is for this reason that it has been held in case laws that the mere fact of a cross claim or a counterclaim is never of itself a bar to the making of a winding up order on a petition by a petitioning creditor (see the case of *In re Douglas Griggs Engineering Ltd* [1963] Ch 19).

[40] It is true the modern practice is that where a company had a genuine and serious cross claim or counterclaim against the petitioning creditor which it had not reasonably been able to litigate, the petition should usually be dismissed or stayed (see the case of *In re LHF Wools Ltd* [1970] 1 Ch 271). However, on this point my learned brother Abdul Aziz Mohamed JCA in his judgment had rightly and clearly amplified the position by stating that it is not sufficient for a company facing a

winding up petition to merely aver by affidavit the existence of a meritorious counterclaim. The company must set out by way of affidavit evidence the facts on which the counterclaim is based, giving the necessary details so that the petitioner will have a fair opportunity to present its side of the story by affidavit and the court, by considering the affidavits will be able to assess, without actually deciding it, whether the claim has weight or raises a serious issue. I agree with his Lordship that the appellant in the present case have not done that. Accordingly, I would dismiss the appeal.

[41] My learned brother, James Foong JCA has seen this judgment in draft and has expressed his agreement with it.

Appeal dismissed with costs.

Reported by Loo Lai Mee